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December 11, 2003

40312974



Superfund

David Wornson
Attorney, Iowa Department of Natural Resources
502 E. 9th St.
Des Moines, IA 50319

RE: Former Manufactured Gas Plant, Council Bluffs, Iowa

Dear Mr. Wornson:

This responds to your letter to Steve Guyer, dated October 16, 2003, in which you ask MidAmerican Energy Company ("MidAmerican") to assess its liability regarding the former manufactured gas plant ("MGP") site in Council Bluffs, Iowa, ("Site") and to provide copies of relevant records.

As I understand the argument advanced by the potentially responsible party(ies), MidAmerican allegedly is successor to any liability that Nebraska Power Company ("NPC") may have had for Iowa based MGP environmental liabilities.¹ For the reasons stated below, MidAmerican is not a potentially responsible party at the Site. I have attached the more significant supporting documents.

NPC's Liability Has Not Been Established

Assuming the factual information presented by the potentially responsible party(ies) is correct, during the period 1917-1928, NPC was the parent of the owner/operator Citizens Gas and Electric Company of Council Bluffs ("CGE"). CGE sold the Site real estate in 1928 to Council Bluffs Gas Company, then allegedly merged into NPC in 1937. No information has been presented regarding the operating relationship between NPC and CGE, and the alleged merger between the two.

Owner and operator liability arguably passed from CGE to Council Bluffs Gas Company in 1928. The asset purchase agreement appears to transfer every aspect of the MGP business to Council Bluffs Gas Company.² Thus, successors to Council Bluffs Gas Company may be responsible for pre-1928 owner/operator liability under the "substantial continuation" test. Under this test, courts look to the substance, not the form of the transaction to find successor liability. See United States v. Mexico Feed and Seed Company, 980 F.2d 478, 488 (8th Cir. 1992). Certainly the equities weigh in favor of assigning liability to the purchaser and then

¹ I have not attempted to verify the historical information the potentially responsible entities have provided regarding events occurring prior to 1946.

² June 1, 1928 Agreement between Citizens Gas & Electric Company of Council Bluffs and Council Bluffs Gas Company. (Attachment 1)

operator of the MGP business and real estate, as opposed to the innocent purchaser of an electric distribution business 18 years after the fact.

Even assuming that CGE retained its owner and operator liability after selling the MGP, NPC may not have succeeded to the liabilities of CGE. Although the parties are reported to have merged, no merger agreement has been presented. Further, there is no information to support a theory of derivative owner and operator liability against NPC. Such a theory would require piercing NPC's corporate veil. A number of factors must be applied in order to determine whether a corporate veil may be pierced, but generally it is possible where the subsidiary was formed to perpetuate fraud, or where there was a failure to observe corporate formalities and separateness. No information has been presented that would indicate either circumstance existed here. Similarly, no information has been presented that would show NPC so controlled the MGP operations that it was directly liable as an operator.

Western Iowa Power Did Not Assume Environmental Liabilities

NPC later was purchased by the Omaha Electric Committee, ("OEC"), a non-profit quasi-public membership corporation without capital stock.³ OEC held assets in trust for the benefit of Omaha Public Power District ("OPPD").⁴ On November 14, 1946, OEC formed Western Iowa Power Company ("WIP") and owned all the shares.⁵ On December 2, 1946, WIP offered to purchase 77,000 shares of NPC stock from OEC.⁶ At that time, it appears that NPC owned and operated electric power facilities only. Upon receipt of the shares, WIP would issue bonds to NPC in the principal amount of \$3,350,000.⁷

That same day, OEC and twelve individuals, owners of all the issued stock of NPC, approved a plan of partial liquidation of NPC whereby WIP would surrender the 77,000 shares of NPC stock, and receive in return certain Iowa assets of NPC.⁸ The Plan of Liquidation approved by the NPC shareholders states that WIP will receive most Iowa electric distribution facilities, and:

other assets connected with the operation of the properties to be acquired by Western Iowa Power Company, consisting of cash, accounts receivable, inventories, prepaid expenses and other current assets, less certain liabilities,

³ Iowa Power and Light Company form U-1 section I(6), p. 1, January 29, 1949.

⁴ WIP directors meeting minutes, July 14, 1948, p. 1; WIP directors meeting minutes, August 18, 1947, p. 2.

⁵ WIP directors meeting minutes, November 19, 1946 p. 1.

⁶ WIP directors meeting minutes, December 2, 1946, p. 1-2. (Attachment 2)

⁷ *Id.* at p. 2. (Attachment 2)

⁸ *Id.* at p. 3. (Attachment 2)

which shall be assumed by Western Iowa Power Company, consisting of accounts payable, accrued taxes, customers' advances, customers' contributions, customers' deposits and accrued interest thereon, other current liabilities, and reserve for injuries and damages, the excess of such assets over such liabilities to equal the net aggregate amount of \$35,000, all as selected and determined by Haskins & Sells and R.W. Beck and Associates.⁹

For the reasons stated above, there is no evidence that NPC held environmental liabilities for the Site. Even assuming it did, there is no indication that the parties intended WIP to assume any specific liabilities, much less Iowa-based MGP environmental liabilities, when purchasing a small minority position in NPC stock for its electric distribution system. Even assuming the liabilities automatically accompanied the NPC stock, WIP held that stock for less than 24 hours before transferring it back to NPC. Even assuming a general rule that liabilities remain when the stock does not, under NPC's Plan of Partial Liquidation, WIP specifically retained only certain listed liabilities, Iowa-based environmental liabilities not being among them.

Iowa Power and Light Company Did Not Assume Environmental Liabilities

On February 11, 1949, Iowa Power and Light Company ("IPL") entered into an agreement with OEC to purchase all the outstanding shares of WIP from OEC for \$3,350,000 for its electric distribution system¹⁰. OEC warranted that the WIP financial statements correctly reflected WIP's financial condition; the financials do not show any recorded liability for Iowa-based MGP environmental liabilities.¹¹

On May 14, 1949, the transaction closed.¹² Later that day, IPL dissolved WIP.¹³ Under the plan of liquidation, WIP transferred all its assets to IPL, and IPL surrendered all of WIP stock to the WIP secretary for cancellation.¹⁴ IPL agreed to "assume all obligations of Western Iowa under all executory contracts, unexpired leases, and other undertakings of Western Iowa."¹⁵ WIP was authorized to wind up its affairs post dissolution.¹⁶

⁹ Id. at p. 4. (Attachment 2)

¹⁰ Agreement between Omaha Electric Committee, Inc. (for itself and as trustee for Omaha Public Power District) and Iowa Power and Light Company, February 11, 1949, p. 2-3. (Attachment 3)

¹¹ Id. at section 6(e), p. 6, and Exhibit A. (Attachment 3)

¹² OPPD Board of Directors resolution, dated May 14, 1949. (Attachment 4)

¹³ WIP Special Directors Meeting Minutes, May 14, 1949. p. 9. (Attachment 5)

¹⁴ Id. at p. 4-5. (Attachment 5)

¹⁵ Id. at p. 5. (Attachment 5)

¹⁶ Id. at p. 5. (Attachment 5)

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As discussed above, WIP did not hold Iowa-based MGP environmental liabilities. Even assuming that it did, OEC did not pass those liabilities to IPL when it sold WIP stock to IPL. The parties relied on financial statements that did not show environmental liabilities. Further, the dissolution was implemented within seven hours of the acquisition of WIP stock. The plan of dissolution did not pass Iowa-based MGP environmental liabilities to IPL.

In summary, there is no evidence that NPC held environmental Site liabilities, and even if did, WIP did not assume liability for the Site. Assuming somehow that NPC held such liabilities, and further assuming that WIP obtained those liabilities, liability did not pass to IPL and then to MidAmerican. WIP and IPL purchased an electric distribution system without any knowledge of, or intent to evade MGP liabilities. There is no equity in requiring MidAmerican to address contamination caused by the MGP.

Due to the focused nature of your inquiry, I have not listed or addressed other defenses that MidAmerican may have, based on Blue Chip or other law, nor have I attempted to find potentially responsible parties.

Please call me if you have any questions.

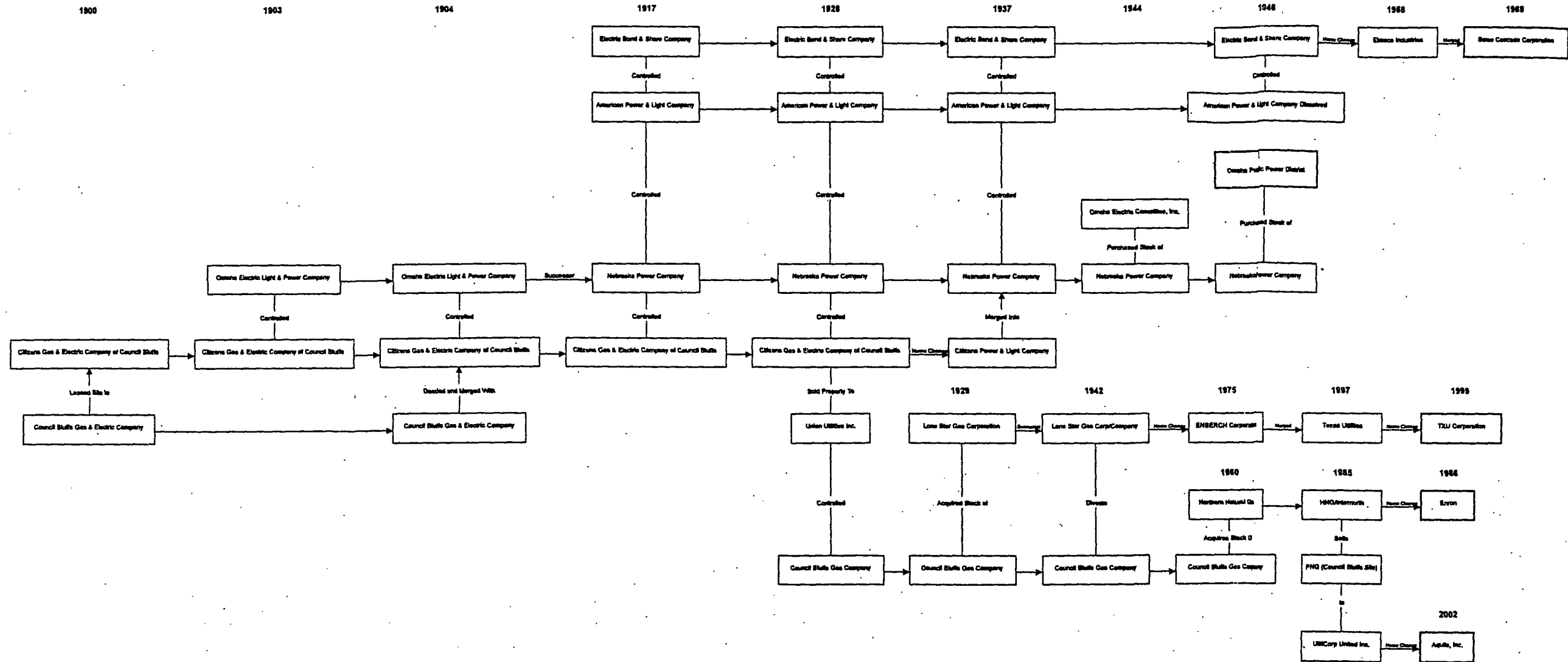
Sincerely,


Peg Roy
Senior Attorney

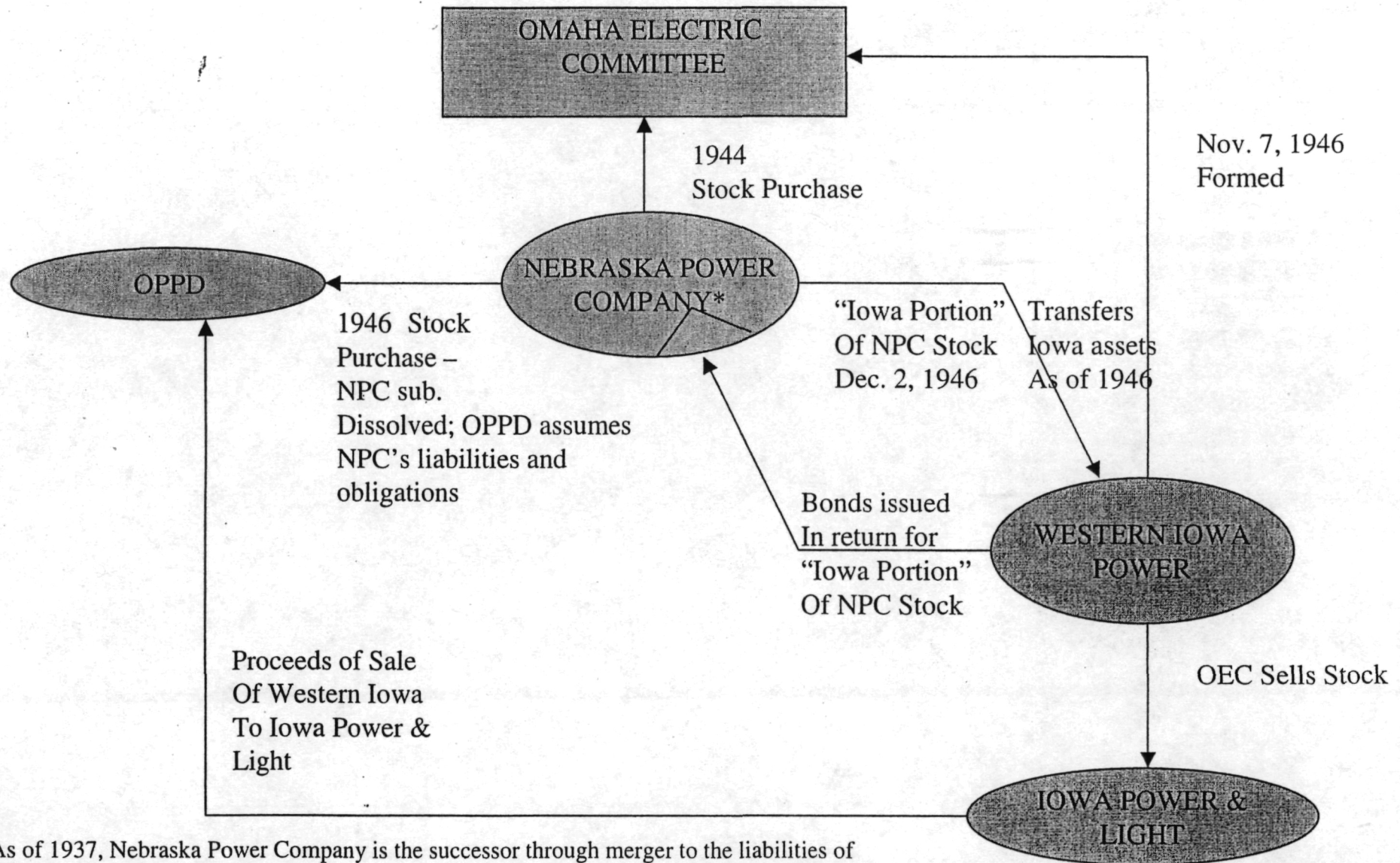
Enclosures

MAR/dsb

Council Bluffs MGP Ownership History



OPPD



* As of 1937, Nebraska Power Company is the successor through merger to the liabilities of Citizens Gas & Electric Company and Council Bluffs Gas & Electric Company, direct operators of Council Bluffs MGP from 1899-1928.